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No. _____

In The

Supreme Court of the United States

October Term, 1990

SORBOTHANE, INC., BTR, INC.,
HAMILTON-KENT MANUFACTURING COMPANY,
and KENNETH M. LEIGHTON,

Petitioners,

v.

SHIRLEY McQUILLAN and LARRY McQUILLAN,
d/b/a SORBOTURF ENTERPRISES,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

No. 1

Can a verdict of attempt to monopolize in violation of Section 2 of the Sherman Act be sustained when the jury has not been charged that it must find either specific intent or a dangerous probability of success?

No. 2

Can concerted activity between two wholly-owned subsidiaries of a common ultimate parent violate Section 1 of the Sherman Act?

No. 3

Can a verdict based on any antitrust violation under the Sherman Act be sustained when the jury has not been charged on the meaning of antitrust injury or the requirement under the law that before arriving at a verdict for the plaintiff it must identify such injury?

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Ninth Circuit are those named in the caption of the case in this Court, as well as Spectrum Sports, Inc. ("Spectrum") and Kenneth B. Leighton ("Jr."), defendants/appellants below who have filed a separate Petition for a Writ of Certiorari. A listing of all parents and non-wholly-owned subsidiaries of Petitioners, as required by Rule 29.1, is attached as Appendix A at 1-2.

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Petitioners, Sorbothane, Inc. ("Sorbothane"), BTR, Inc. ("BTR"), Hamilton-Kent Manufacturing Company ("H-K"), and Kenneth M. Leighton ("Sr.") (hereinafter collectively referred to as "SI" unless the context requires otherwise) respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth

Circuit") dated July 3, 1990, and as modified by the Ninth Circuit on April 1, 1991, Appendix A, 3-33 hereto.[1]

OPINION BELOW

The opinions of the Ninth Circuit are unreported memoranda decisions and are attached as Appendix A at 3-33.

JURISDICTION

The judgment of the Ninth Circuit initially was entered on July 3, 1990. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied by order of April 1, 1991.

This Petition for a Writ of Certiorari is filed under Section 2101 of Title 28 of the United States Code within ninety days of denial of SI's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the trial court was based upon 15 U.S.C. § 15.[2]

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[1] The unreported opinion of the United States District Court for the Southern District of California ("trial court") on post-trial motions appears as Appendix A (34-43) hereto.

[2] Jurisdiction in the trial court was also based upon 18 U.S.C. § 1964 of the Racketeer Influenced and Corrupt Organizations Act (RICO). The opinion of the Ninth Circuit, however,

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STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any one person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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did not address the RICO claims and judgment below, and rested solely on an analysis of the antitrust claims brought against SI.

3. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Respondents, Shirley McQuillan and Larry McQuillan, individually and d/b/a Sorboturf Enterprises (collectively "McQuillan"), formerly distributed Sorbothane® athletic products made of Sorbothane®, a patented product, and produced at various relevant times by H-K and then Sorbothane. McQuillan sued SI, Jr. and Spectrum (hereinafter where appropriate Jr. and Spectrum are collectively referred to as "Spectrum") after Shirley McQuillan's services were terminated by Sorbothane. McQuillan asserted claims under federal and state antitrust laws, RICO, breach of contract, fraud, unfair competition, bad faith denial of existence of contract and conversion.

SI, without success, proposed jury instructions, or challenged those given by the trial court, on 1) dangerous probability of success; 2) intra-corporate activity under the teaching of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772 (1984); and 3) antitrust injury. The jury found against SI on all counts.

The jury found BTR liable solely on the theory that two of its wholly-owned affiliates, H-K and Sorbothane,

were so closely managed and supervised by BTR that they were its alter ego. No individual wrongdoing by BTR was asserted or claimed to be shown at trial.

The jury found for Spectrum and Jr. on McQuillan's claims under Section 1 of the Sherman Act, however, leaving as the only conspiracy parties affiliated corporations.[3]

Spectrum and Jr. were found liable under provisions of Section 2 of the Sherman Act.

The jury awarded $1,743,000 on each of the claims on which SI and Spectrum were found liable. The trial court then denied post-trial motions for new trial and judgment notwithstanding the verdict ("JNOV") and entered judgment in the amount of $5,229,000 (compensatory damages trebled) together with attorneys' fees and costs.[4]

SI appealed from the jury verdicts and challenged various trial court rulings including instructions given or

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[3] The opinions of the Ninth Circuit conceded that the evidence showed that SI and Leyland and Birmingham ("Leyland") were both licensed to manufacture and sell the subject patented product, Sorbothane®, by a BTR family member holding the license and were corporations existing under a family of companies ultimately owned and controlled by BTR, plc. (Appendix A at 13). However, the Ninth Circuit opinion determined that *Copperweld* was inapplicable based on its view that "the evidence was to the effect that both corporations operated autonomously," and held themselves out as competitors (*id.*).

[4] The fee award was the subject of a cross-appeal which was denied by the Ninth Circuit. There is currently pending before the Ninth Circuit McQuillan's request for attorneys' fees on appeal.

denied by the trial court and the denial of motions for new trial, directed verdict and JNOV.

REASONS FOR GRANTING THE WRIT

I. THE *LESSIG* RULE, WHICH ALLOWS FOR THE IMPOSITION OF LIABILITY FOR ATTEMPTED MONOPOLIZATION WITHOUT ANY SHOWING OF SPECIFIC INTENT OR A DANGEROUS PROBABILITY OF SUCCESS, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND DISREGARDS DECISIONS OF THIS COURT.

The Ninth Circuit's affirmance of the trial court as it related to the Section 2 attempt to monopolize claim can only be rationalized with the assumed validity of *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).[5] The Ninth Circuit held that McQuillan need not prove the "dangerous probability of success" element of the Section 2 offense.[6] Instead, the Ninth

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[5] Should the Section 1 claim against SI be vacated under the *Copperweld* argument, then the Section 2 claim must fall without regard to the validity of *Lessig*. This is true because *Lessig*, as applied by the Ninth Circuit, only allows the inferences of specific intent and a dangerous probability upon proof of predatory conduct as shown by a *per se* violation of Section 1. *See, e.g., Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979). In the present context, and on the present proof and charge, without a Section 1 violation, there is no factual basis for a Section 2 violation.

[6] Specifically, SI objected to that portion of the attempt to monopolize charge which stated: "If plaintiff has shown that defendants engaged in predatory conduct you may infer from

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Circuit maintains that "dangerous probability" may be inferred from evidence of proof of specific intent to monopolize, which in turn may be inferred from evidence of predatory conduct. This holding, which has been applied in the Ninth Circuit repeatedly since 1964, is directly at odds with this Court's consistent holding that dangerous probability of achieving monopoly power is a necessary element of proof in any attempted monopoly claim. *See Lorain Journal Co. v. U.S.*, 342 U.S. 143, 153 (1951); *Am. Tobacco Co. v. U.S.*, 328 U.S. 781, 785 (1946); *Swift & Co. v. U.S.*, 196 U.S. 375, 396 (1905).

The most definitive rejection of a *Lessig*-type rationale was made by this Court in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) where the Court stated:

> To establish monopolization or attempt to monopolize a part of trade or commerce under Section 2 of the Sherman Act, it [is] necessary to appraise the exclusionary power . . . in terms of the relevant market where the product is

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that evidence the specific intent and the dangerous probability elements of the offense, without any proof of the relevant market of the defendant's market power." This objection was repeatedly raised and preserved in the trial court. Initially, the Ninth Circuit overlooked the preservation of this objection and chided trial counsel for not objecting to a *Lessig* charge. It then relied on its mistaken belief that no objection had been made or preserved as its rationale for not considering the vitality or demise of *Lessig*. When confronted on petition for rehearing with SI's demonstration that its counsel had objected to the *Lessig* charge, the Ninth Circuit corrected its Memorandum Decision to reflect this fact, and without comment clung to *Lessig*.

> involved. Without a definition of that market, there is no way to measure . . . ability to lessen or destroy competition.

Id. at 177.

Walker reaffirms that the fundamental purpose of the antitrust laws is to protect competition, rather than competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962). Here, as the Ninth Circuit conceded, there was no proof by McQuillan of any dangerous probability of success. Yet, *Lessig* relieved McQuillan from that burden at trial, thus acting squarely against the decisions of this Court and the fundamental purpose of the antitrust laws.

The *Lessig* rule is also inconsistent with the clear mandate in *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884 (1990), that an antitrust injury must be proved. By cutting out the need for any proof of the market in which the alleged anticompetitive threat exists, *Lessig* effectively grants to competitors a presumption of injury. However, logic dictates the flaw: without knowledge of the relevant market, much less a defendant's power in that market, proof of anticompetitive conduct alone will not at law support an inference of antitrust injury as required by *Atlantic Richfield*.

In sum, *Lessig's* presumption, if left standing, effectively writes the intent and dangerous probability of success elements out of Ninth Circuit antitrust law.[7]

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[7] *Lessig* deprives the antitrust defendant of the affirmative presumption of *Oahu Gas Serv., Inc. v. Pac. Resources, Inc.*, 838

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Lessig is also squarely in conflict with the law of every other Circuit that has addressed the issue: each has affirmed and reaffirmed that a showing of dangerous probability in a relevant market is essential to establish attempted monopoly claims.[8] Several of these Circuits have also expressly declined to follow, or have rejected, *Lessig*,[9] and *Lessig* has been severely and soundly

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F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988), that if there is a concurrent non-antitrust motivation for the termination, then an antitrust motive should not be presumed. *Id.* at 368-69.

[8] *See, e.g., Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 693 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 441 (1990); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1505 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989); *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 494 n.9 (4th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987); *Gen'l Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); *Dimmitt Agri Indus., Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 525-26 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *U.S. v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Nifty Foods Corp. v. Great Atlantic & Pac. Tea Co., Inc.*, 614 F.2d 832, 841 (2d Cir. 1980); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1096 (3d Cir. 1978); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Int'l Tel. & Tel. Corp.*, 104 F.T.C. 280, 408 (1984).

[9] *See, e.g., Int'l. Dist. Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 790 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987); *Consul*, 805 F.2d at 494 n.9; *U.S. v. Am. Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985); *Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1366-67 (Fed. Cir.), *cert. denied*, 469 U.S. 821 (1984); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 711-12 (7th Cir. 1979), *cert. denied*, 445 U.S.

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criticized by the commentators.[10] Indeed, one panel of the Ninth Circuit acknowledged the criticism, yet held to the *Lessig* doctrine, apparently permitting *stare decisis*, rather than logic, to carry the day. *See Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1214 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985).

The antitrust laws were not designed to be a panacea to deal with all possible claims of unfair conduct. Rather, the antitrust laws were designed by Congress to project competition. *Lessig* transforms the antitrust laws into super-unfair trade practices acts because it strips the antitrust laws, and the attempted monopoly power doctrine, of their true antitrust objectives. Because *Lessig* disregards the statute and this Court's rulings, and because it conflicts with the decisions of other Circuits, the Writ of Certiorari should be granted finally to end *Lessig's* twenty-seven-year reign of error in the Ninth Circuit.

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917 (1980); *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296, 305-06 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *George R. Whitten*, 508 F.2d at 550; *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 287 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973).

[10] *See* III P. Areeda & D. Turner, *Antitrust Law*, ¶832 at 336-39, ¶833 at 339-43, ¶835a at 346 (1978); M. Handler & R. Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. Pa. L. Rev. 125, 153-55 (1980); B. Hawk, *Attempts to Monopolize – Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L. Rev. 1121, 1152 n.147 (1973); D. Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust L.J. 165, 171 (1967).

II. THE FAILURE OF THE NINTH CIRCUIT TO APPLY *COPPERWELD* TO THE BTR FAMILY OF WHOLLY-OWNED COMPANIES CONFLICTS WITH AND DISREGARDS THIS COURT'S *COPPERWELD* RATIONALE AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Ninth Circuit sustained the antitrust jury verdict on Section 1 of the Sherman Act predicated on a supposed plurality created by a concert of action between two corporations wholly owned by the same parent. Relying on two pre-*Copperweld* decisions, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951) and *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980), the Ninth Circuit concluded that companies under common ownership and control can conspire to violate Section 1 of the Sherman Act if they hold themselves out as competitors, and identified what it claimed constituted factual support for the conclusion that Leyland and Sorbothane, the BTR affiliates, met this test.

The Ninth Circuit then approved the trial court's instruction which it viewed as "along the lines of *Las Vegas Sun*" rejecting SI's claim that the trial court erred by failing to give a proper *Copperweld* instruction.[11] Appendix A at 13-14.

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[11] SI argued at directed verdict that, as a matter of law, the affiliated corporations could not form a plurality of action. The trial court rejected this analysis of *Copperweld* and, instead, gave the following fact-based jury instruction which was approved by the Ninth Circuit:

> A conspiracy between affiliated corporations may be found to exist unless the affiliated corporations are functioning as a single economic enterprise. The

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The Ninth Circuit's analysis, based on *Kiefer-Stewart* and *Las Vegas Sun* is incorrect and contrary to this Court's holding in *Copperweld*. The very language that the Ninth Circuit cited from *Kiefer-Stewart* was criticized by the *Copperweld* Court as being short on analysis and as failing "to confront the anomalies an intra-enterprise doctrine entails." *Copperweld*, 457 U.S. at 764. The *Copperweld* Court specifically criticized the *Las Vegas Sun* "single entity" test that the trial court included in its charge because the factors used in that test are insufficient to describe a separate economic entity for purposes of the Sherman Act. Rather, those factors simply describe the manner in which a parent chooses to structure a sub-unit of itself. Regardless of how the parent chooses to structure a sub-unit of itself, however, the controlling fact, as *Copperweld* teaches, is whether the ultimate interest of the subsidiary

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defendants have the burden of establishing that all members of the alleged conspiracy function as a single economic enterprise. To determine whether affiliated corporations function as a single economic enterprise, the jury must examine the particular facts of the case before it in accordance with various criteria. Among the criteria which may be examined when determining whether affiliated corporations function as a single economic enterprise are: (1) whether they have separate control of their day-to-day operations; (2) whether they hold themselves out as competitors; (3) whether they have separate officers; (4) whether they have separate corporate headquarters; and (5) whether they have common investors or owners. To find affiliated corporations to be a single economic enterprise, the jury must find a complete unity of interest between them.

and the parent are identical. If so, the parent and subsidiary must be viewed as a single economic unit. *Copperweld* 457 U.S. at 772 n.18.

Here, the interests of two corporations ultimately wholly owned by the same parent, (and the interests of the parent) are also identical, so the entities must also be "viewed as a single economic unit." The *Copperweld* Court recognized that "the economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition." *Id.* at 772.

Under *Copperweld*, the alleged "division of markets" between Leyland and Sorbothane (which in the Ninth Circuit's view supported the Section 1 claim) would not violate Section 1 if Leyland and Sorbothane were operated as divisions of one parent. Yet, the decision of the ultimate parent, BTR plc, to establish separate corporations (Sorbothane and Leyland) rather than divisions (for economic, legal or other considerations) does not remove Leyland and Sorbothane from *Copperweld's* analysis and rationale. *Id.* at 772-73. The Ninth Circuit holding to the contrary was erroneous and should be reversed since the sole basis for Section 1 liability rested on the Ninth Circuit's rejection of *Copperweld* reasoning in this case.

At least four Circuit Courts, contrary to the Ninth Circuit, have held that the reasoning of *Copperweld* is not to be limited to a narrow parent-subsidiary fact pattern. *See Advanced Health-Care Serv., Inc. v. Radford Community*

Hosp., 910 F.2d 139, 146 (4th Cir. 1990); *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987); *Greenwood Util. Comm. v. Miss. Power Co.*, 751 F.2d 1484, 1496 (5th Cir. 1985). Those courts recognize that economic substance, as opposed to legal form, is the basis of *Copperweld*. The Ninth Circuit's contrary view thus creates a split in the Circuits of substantial and recurrent import which should be resolved by this Court.

III. THE NINTH CIRCUIT FAILED TO APPLY THE CLEAR DIRECTION FROM THIS COURT IN ATLANTIC RICHFIELD THAT ANTITRUST INJURY MUST BE PROVED AND NOT PRESUMED.

In *Atlantic Richfield*, this Court reversed a Ninth Circuit decision, and held that even if injury to competition is presumed from a *per se* violation of the Sherman Act, the individual plaintiff seeking damages and relief *must*, if it is to have standing to sue, additionally prove that it suffered "antitrust injury."[12] The plaintiff must be injured

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[12] In SI's Petition for Rehearing and Suggestion for Rehearing *En Banc*, SI directed the attention of the Ninth Circuit to the *Atlantic Richfield* case which was decided after oral argument but before the Ninth Circuit initially affirmed the trial court. The jury here was not instructed that "antitrust injury" was required to be proved even though SI specifically requested such an instruction and objected to its omission when the trial court refused SI's request. The Ninth Circuit decision was directly contrary to *Atlantic Richfield* in this regard; but it refused to grant rehearing or to correct its error.

"by reason of" the antitrust violation and the injury suffered must be an *injury to competition*. As this Court stated, "[the] antitrust injury requirement insures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason." 110 S.Ct. at 1894 (emphasis in original).

Here, because the trial court refused to grant SI's charge,[13] the jury was not instructed that McQuillan had to prove "antitrust injury". Despite this reversible error on the part of the trial court, the Ninth Circuit did not even mention, let alone respond to, the express call to its attention of *Atlantic Richfield*. It simply affirmed.

The Ninth Circuit's failure to apply *Atlantic Richfield* is particularly egregious where, as here, absent an antitrust injury charge, there is no way to determine whether the jury made a determination that because McQuillan may have been "harmed" in some way (*i.e.*, she lost her ability to distribute Sorbothane® products) that in turn her injury *must* have been caused by some anticompetitive conduct.[14] All that can be determined is that the

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[13] For each of the substantive antitrust offenses, SI requested a charge that an element of the claim which must be shown by the plaintiff was antitrust injury. This request was denied for each of the antitrust claims presented to the jury.

[14] Indeed, logic precludes such an assumption since the jury was not given a definition of "antitrust injury" and was not charged that its finding was required to establish liability.

jury found she was injured. For antitrust purposes, that is simply not enough. The error is further compounded when one considers the attenuated chain of inferences under the Section 2 claim allowed by *Lessig* which effectively precludes the need for any showing of injury to competition.

Atlantic Richfield is clear; it requires proof of "antitrust injury". Here not only was proof of antitrust injury lacking, but the jury was not instructed on the meaning of "antitrust injury" and was not charged that, for McQuillan to prevail, it must find "antitrust injury."

CONCLUSION

It is important and timely that this Court address the issues raised by this Petition and rid the Ninth Circuit courts of the *Lessig* rule. *Lessig* has been rejected by courts and the commentators repeatedly, universally and soundly. *Lessig* subjects those doing business within the geographic boundaries of the Ninth Circuit to unfair and radically different applications of the federal antitrust laws from the rest of the nation. *Lessig* negates the causality requirement that is required by this Court to impose antitrust liability. For years the *Lessig* rule has resulted in, and caused, excessive and unnecessary litigation and a vast amount of confusion in the courts and business community. *Lessig* here, and in many other cases, has led, leads and will continue to lead to unjust results unless corrected.

The application of *Copperweld* to subsidiaries of a common parent should be expressly confirmed so that the

conduct of businesses, which operate in a variety of legal forms, will be analyzed by the sound rationale that flows from attention to substance. *Copperweld* does not teach corporate form or encourage mega-subsidiaries as a means of falling within its analysis. Rather, the antitrust laws were not meant to reach, on conspiracy claims, wholly-owned affiliated corporations, just as they were not meant to reach parents-subsidiaries.

Finally, *Atlantic Richfield* is the law of the land. That law was ignored by the Ninth Circuit. Antitrust injury is required to be *proved*. No injury is presumed even in the case of a *per se* violation. The Ninth Circuit failed to apply the *Atlantic Richfield* rationale once and was reversed by this Court. This Court should once again reverse the Ninth Circuit making clear that this Court's decisions must be followed.

Dated June 28, 1991.

Respectfully submitted,

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APPENDIX

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

1. Parents of Hamilton-Kent Manufacturing Company, Inc. and Sorbothane, Inc.

Both are wholly-owned subsidiaries of BTR (DHC) Inc., which is in turn wholly owned by BTR, Inc.

2. Parents of BTR, Inc.

BTR, Inc. is a wholly-owned subsidiary of BTR Dunlop Inc., which in turn is wholly owned by BTR Dunlop Holdings, Inc., which in turn is wholly owned by BTR International Limited, a wholly-owned subsidiary of BTR plc.

3. Non-Wholly-Owned Subsidiaries of Hamilton-Kent Manufacturing Company, Inc. and Sorbothane, Inc.

There are no subsidiaries for these companies.

4. Non-Wholly-Owned Subsidiaries of BTR, Inc.

The following companies are indirect subsidiaries of BTR, Inc. and are not wholly owned by BTR, Inc. or its wholly-owned subsidiaries.

A. BTR Brazil Ltda.

B. Huyck Australia Pty. Ltd. – BTR Gas Measurement Pty. Ltd. – Australian Meter Manufacturers Pty. Ltd.

C. Wadco Tools Ltd. (India)

D. Valvulas Worcester de Argentina S.A.

E. Valvulas Worcester do Brazil Ltda.

F. Audco Sulamericana Ltda.

G. Dunlop Automotive Composites, Inc.

H. Permoica S.A.

I. Zamif Schlegel Co., Ltd. (Saudi Arabia)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIRLEY McQUILLAN, *et al.*, Plaintiffs/Appellees/ Cross-Appellants, vs. SORBOTHANE, INC., *et al.*, Defendants/Appellants/ Cross-Appellees.	)	Case No. 89-55326 89-55329 89-55332 DC #CV-84- 1585-E MEMOR- ANDUM* (Filed July 3, 1990)

Appeal from the United States District Court
for the Southern District of California
William B. Enright, District Judge, Presiding

Argued and Submitted April 13, 1990
Pasadena, California

Before: TANG and O'SCANNLAIN, Circuit Judges, and MARQUEZ, District Judge.**

This is an action brought by Shirley McQuillan and Larry McQuillan, individually and dba Sorboturf Enterprises (McQuillan) against the defendants BTR, Inc.,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

Hamilton-Kent Manufacturing Company (H-K), Sorbothane, Inc. formerly Sorbo, Inc., Kenneth M. Leighton, Sr., Spectrum Sports, Inc. and Kenneth B. Leighton, Jr. Claims were asserted under federal and state antitrust laws, RICO, breach of contract, fraud, unfair competition, bad faith denial of existence of a contract, and conversion.

The jury, after a lengthy trial, found against the defendants BTR, Inc., H-K, Sorbothane, Inc. and Leighton, Sr. on all Counts. Spectrum and Leighton, Jr. were found liable on the claims for unfair competition (Section 17200 California Business and Professions Code), interference with prospective business advantage, violation of Section 2 of the Sherman Act, and violations of the RICO Act, 18 U.S.C. §1962(b), (c), and (d). The jury found that H-K was the agent or alter ego of BTR, Inc.

The jury assessed $1,743,000 in each of the claims on which the defendants were found liable. The District Court entered judgment in the sum of $5,243,000 (compensatory damages trebled), together with reasonable attorneys fees and costs.

McQuillan moved for attorneys fees under the state and federal antitrust laws and the RICO laws. The application sought fees of $1,759,969, reflecting 9,008.4 hours at a rate of $130.94 per hour. McQuillan additionally sought an enhancement for delay of $137,358, and an enhancement of 33% ($436,684) for the risk of non-payment, for total enhancement of $574,042.00 which the Court denied. The Court awarded the sum of $912,032.50 for attorneys fees. Defendant/Appellants appeal from the jury verdicts and challenge certain trial court rulings

relating to the testimony of the plaintiffs' expert, a Motion in Limine granted by the Court, denial of Motions for A New Trial, Directed Verdict, and JNOV, and certain instructions given by the Court.

McQuillan appeals the District Court's denial of the request for enhancement of attorneys fees.

FACTS AND PROCEEDINGS BELOW

Conflicts in the evidence have been resolved in favor of the party who prevailed on a particular claim.

Sorbothane is a viscous elastic polymer invented by Dr. Maurice Hiles in England. It is a solid that absorbs energy like a liquid. Dr. Hiles' work on Sorbothane was funded by British Technology Group [BTG].

BTR, Inc. [BTR], a Delaware corporation, is a holding company which at all relevant times owned, directly or indirectly, H-K and Sorbothane, Inc. [S.I.]. Up to May 1982, S.I. was the Sorbo Division of H-K.

In 1982 S.I. was formed to take over H-K's Sorbothane business.

Spectrum Sports, Inc. [Spectrum] is an Ohio corporation, formerly Ohio Cushions, Inc., and is owned by Kenneth B. Leighton [Jr.] and Michael Silvestro.

Kenneth M. Leighton, Sr. [Sr.] is Jr.'s father. He served as President of H-K and S.I. at all relevant times. He became interested in Sorbothane and in August 1980 an unrestricted license to manufacture and sell Sorbothane "in all world markets" was granted to H-K by B.T.R. Development Services Ltd.

At all times material herein John Cahill was President of BTR, Chairman of H-K, and possibly a Director of H-K. He was also a member of the Board of S.I.

A United Kingdom Company, Birmingham and Leyland [Leyland], was also licensed to manufacture and sell Sorbothane without territorial restrictions.

In 1980, Dr. Hiles was hired as a consultant to H-K in the United States.

When Shirley McQuillan read a magazine article in the spring of 1980 about the shock absorbent qualities of Sorbothane, she thought it might work as a horseshoe pad. McQuillan, along with acquaintance Alby Jardine, contacted Dr. Hiles in England. The McQuillans and the Jardines formed a company called Safe and Sound as a base to develop Sorbothane equestrian products.

Jr. was then President of Marketing for H-K. McQuillan presented to H-K a letter of intent regarding their prospective business relationship. The letter of intent, signed by Sr., President of H-K, anticipated a definitive agreement granting Safe and Sound the exclusive right to purchase Sorbothane for resale as equestrian products.

In the summer of 1981, McQuillan resigned from Safe and Sound. She and her husband Larry formed a company called Sorboturf for their Sorbothane development. While McQuillan was developing a Sorbothane horseshoe pad, H-K was attempting to develop a national market for other Sorbothane products, including athletic shoe inserts and medical products.

Sr., along with H-K's marketing manager Laurene Heinsohn, decided to use regional distributors. In December 1982 Heinsohn left S.I. and was employed by Spectrum Sports.

McQuillan and her company Sorboturf were selected as the distributor for the southwestern United States. Jr., at the time Vice President of marketing at H-K, decided that he too wanted to be a distributor. In addition to Sorboturf and Jr.'s company Spectrum Sports, the other distributors were Myron McCone (Shirley McQuillan's father) and his company RHR, Inc., Triad Research (Marty Vogel), and Absorbotech (Arnie Lund). The distributorships were established by early August, 1981.

On September 15, 1981, H-K sent to McQuillan a letter enclosing a price list. Sorboturf thereafter began buying and distributing Sorbothane products. Shortly after Sorboturf began distributing Sorbothane in the fall of 1981, McQuillan received from H-K a draft contract. H-K's proposed contract suggested that either party could terminate upon sixty days notice. McQuillan protested that she would not invest substantial time and money in developing the Sorbothane market if H-K could terminate her distributorship without cause.

H-K required its regional distributors to agree to fix wholesale and retail prices. Thus, McQuillan and each distributor were required to agree to sell to retailers at a fixed markup and further, to "police" the retailers to prevent discounting at the retail level. Heinsohn told the distributors that if they learned of retailers discounting the product, the offending retailer was to be cut-off.

Heinsohn warned the distributors that violating the pricing agreements would jeopardize their distributorships.

In January 1982, there was a meeting in Jr.'s office involving Sr., Jr., Heinsohn and John Burne. Burne, through his company IEM, had marketed Sorbothane in England. In late 1981, Burne had proposed becoming the national Sorbothane medical distributor in the United States. Heinsohn objected, pointing out that H-K had already committed the medical market to the regional distributors. By the time of the January, 1982 meeting, Sr. had appointed IEM as the national medical distributor.

McQuillan had always paid her H-K invoices within thirty days. In addition to meeting her obligations as an athletic distributor, McQuillan had continued to work diligently with Dr. Hiles to develop a marketable Sorbothane horseshoe pad.

In April 1982, Sr. called a meeting in Chicago with McQuillan, her father, and Heinsohn. Sr. told Heinsohn that the purpose of the meeting was to move McQuillan out of the athletic market by making her right to distribute equestrian products conditional upon the relinquishment of her athletic distributorship.

In May, 1982, McQuillan attended a meeting at the S.I. facility in Ohio. Attendees included Sr., Jr., Heinsohn, Dr. Hiles and John Forsyth, a Sorbo, Inc. engineer. As of May 1982, the Sorbothane business had been moved by BTR, Inc. from H-K to Sorbo, Inc. Heinsohn moved to Sorbo, Inc. as its marketing manager.

After the meeting, Heinsohn made it clear to McQuillan that McQuillan had to sell her athletic distributorship to Jr. to keep the equestrian distributorship rights. Heinsohn scheduled a meeting that afternoon with Jr. for McQuillan to discuss such a "sale." Jr. informed McQuillan at that meeting that she would either come to an agreement with him or she would be "looking for work."

In June 1982, S.I. announced that Intermark would be the new national distributor for the "box shoe trade;" shoe stores that carry a variety of shoes as opposed to simply athletic shoes. Heinsohn testified that the box shoe trade had been part of McQuillan's market.

In late summer or fall of 1982, Heinsohn became aware for the first time that S.I. had involved Dr. Kent Vasko of Sterivet, Inc. in the horseshoe pad project. At the conclusion of a distributor's meeting in the fall of 1982, Sr. casually informed McQuillan that " . . . we have appointed Sterivet as the national equestrian distributor, and you are no longer involved in equestrian products."

In November, 1982, Sr. presented his "last agreement" for an athletic distributorship with Sorboturf. This one, however, clearly permitted termination without cause. In response, McQuillan submitted her own contract that permitted termination only for cause.

In December 1982, Heinsohn, at Sr.'s direction, instructed Dr. Hiles and Forsyth to deliver test documentation and prototypes for the McQuillan horseshoe pad. In January 1983, S. I. began marketing the horseshoe pad. According to Dr. Hiles, the pad marketed by S.I. was

indistinguishable from the pad he and McQuillan had developed.

Although unwilling to sign McQuillan's proposed contract for Sorboturf's athletic distributorship, S.I. did not sever the relationship and continued to treat Sorboturf as a distributor.

On August 1, 1983, with no previous warning or explanation, S.I. notified McQuillan in writing that S.I. "would no longer accept Sorboturf's order." In August, 1983, McQuillan's father was also terminated as a distributor without explanation, warning or justification. Less than one month later, Sorboturf's customers received notice that Jr.'s company was now the national distributor.

After receiving the August 1, 1983, letter from S.I., McQuillan contacted Dr. Hiles about the possibility of continuing her distributorship using British manufactured Sorbothane. However, Dr. Hiles informed her that Leyland, the other manufacturer of Sorbothane, was unwilling to sell in the United States. Having no alternative source of Sorbothane, McQuillan's distributorship was destroyed.

Birmingham and Leyland, although not restricted from making sales in the United States under its license agreement, had entered into an agreement with H-K that it would not sell in the United States and Canada and H-K, in turn, would not sell in Europe.

There are two groups of defendants/appellants/cross-appellees. They are:

(1) Sorbothane, Inc. [S.I.], Hamilton-Kent, Inc. [H-K], BTR, Inc., and Sr. [S.I. Group]; and

(2) Spectrum Sports, Inc. and Jr. [Spectrum Group].

DISCUSSION

THE SHERMAN ACT SECTION 1 CLAIM

McQuillan claimed an agreement between S.I. and its competitor, Leyland, to allocate the world market for Sorbothane products. The Courts treat horizontal market division agreements as per se violations of the Sherman Act. In *United States v. Topco. Associates, Inc.*, 405 U.S. 596, 608, 92 S.Ct. 1126, 1134 (1972) The Supreme Court said:

> "It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act. . . . One of the classic examples of a per se violation of Section 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in contradistinction to combinations of persons at different levels of the market structure, e.g. manufacturers and distributors, which are termed 'vertical' restraints. This court has reiterated time and time again that 'horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' [Citations omitted.] Such limitations are per se violations of the Sherman Act."

An action under Section 1 of the Sherman Act requires proof of a contract, combination, or conspiracy in restraint of trade. 15 U.S.C. Section 1. The essence of a

Section 1 claim is concerted action. *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 525 (9th Cir. 1987). Heinsohn and Hiles testified that it was their understanding that there was an agreement by the two companies whereby Leyland would not export any Sorbo products into the United States and S.I. would not export products to Europe. Around October 1982 a United States company called Frelen U.S. was interested in obtaining Sorbothane products. Leyland informed Frelen U.S that they would supply the materials or parts. This prompted a telex from Heinsohn on behalf of S.I. to Leyland informing them that "the import of finished Sorbo parts to a U.S. customer is in direct opposition to a harmonious marketing relationship between our two companies." This resulted in a telex from a Leyland official to S.I. apologizing for any problems which may have been caused and asking that he be advised if we, Leyland, are guilty of any further infringements at any time.

S.I.'s argument is that Leyland and S.I. are sister corporations and they are incapable of conspiring under the holding of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772, 104 S.Ct. 2731, 2741-42 (1984). In *Copperweld* the Supreme Court held as a matter of law that a parent and its wholly-owned subsidiary are not distinct entities for the purpose of establishing the plurality requirement under a Section 1 claim. Since *Copperweld*, some circuits have held that not only wholly-owned subsidiaries and their parents are incapable of conspiring, but that sister subsidiaries are the same entity for purposes of an antitrust conspiracy under Section 1 and thereby do not satisfy the plurality element. The Ninth Circuit declined to reach this question as between sister

corporations in *Wilcox v. First Interstate Bank of Oregon, N.A., supra.* S.I. contends that the Court should have directed a verdict or granted JNOV because the jury found that neither Spectrum nor Jr. conspired under the antitrust laws, therefore the only possible conspirators are Leyland and S.I. and they are incapable of conspiring as a matter of law under *Copperweld.*

The District Court denied the Motion for a Directed Verdict and JNOV. While the evidence did show that S.I. and Leyland were licensed by a BTR family member and that they are corporations existing under a family of companies controlled by BTR, PLC, a U.K. Holding Company, the evidence was to the effect that both corporations operated autonomously. This was true of all of the corporations that were in the BTR family. John Cahill was a defense witness for S.I. He testified that there are about 650 units under the BTR family throughout the world. They are engaged in producing many different types of products and operate as independent units entirely autonomously. Hiles testified that some of the companies in the BTR family are strictly holding companies and some are operating companies. The operating companies operate as individual companies.

The Supreme Court has held that "common ownership and control does not liberate (two separately incorporated subsidiaries within the same corporate family) from the impact of the antitrust laws . . . especially . . . where (they) hold themselves out as competitors." *Kiefer-Stewart Co. v. Joseph E. Seagrams and Sons, Inc.*, 340 U.S. 211, 215, 71 S.Ct. 259, 261 (1951). The Ninth Circuit has held that "to conspire within the meaning of the

Sherman Act, corporate entities within a single organization must be sufficiently independent of each other for the concerted action to raise antitrust concerns . . . to determine whether corporate entities are separate enough to be capable of a conspiracy, a Court must examine the particular facts of the case before it . . . if the intra-enterprise entities hold themselves out as competitors, the rule that they can not avoid Sherman Act liability by hiding behind a common ownership and control is "especially applicable." *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979). The District Court gave an instruction along the lines of *Las Vegas Sun, Inc.* The jury made a factual determination against S.I. on this issue.

A Motion for JNOV focuses on the sufficiency of the evidence. The standard for granting a JNOV is the same as for a directed verdict. *Fountila v. Carter*, 571 F.2d 487, 489-90 (9th Cir. 1978). The Court considers "all of the evidence in the light most favorable to the non-moving party and draw(s) all reasonable inferences in favor of that party." *Twin City Fire Ins. v. Philadelphia Life Ins. Co.*, 795 F.2d 1417, 1423 (9th Cir. 1986). The Court properly denied S.I.'s Motions for JNOV and a Directed Verdict.

TESTIMONY OF McQUILLAN EXPERT

The District Court's evidentiary rulings will be upheld on appeal unless the court abused its discretion, *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984), *cert. denied* 469 U.S. 1165, 105 S.Ct. 926 (1985), or committed "manifest error." *United States v. Marabelles*, 724 F.2d 1374, 1381 (9th Cir. 1984). There is abuse of discretion if the lower Court decision is clearly erroneous or is based

on incorrect legal standards. *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985). McQuillan elected to prove damages by showing a "loss of business value." The method of proving "loss of business value" was addressed by the Ninth Circuit in *Simpson v. Union Oil Company of California*, 411 F.2d 897 (9th Cir. 1969) as follows:

> "The issues should have been, what was the value of the business, what money did appellant have invested in it, what was its net income after deducting a fair return on capital and a fair compensation to appellant for his work, what were the prospects of continual renewals of the lease, and finally, if illegal restraints were removed, what were the prospects of additional profits from the business as it became better established. These are the factors that a willing buyer would consider in determining fair market value of the business . . . " 411 F.2d at 910.

James H. West, McQuillan's expert, testified as follows: He is a C.P.A., having been certified in 1952. He estimates that he has testified in Court as an expert on at least thirty occasions. He has experience in valuations of businesses since the early 1960's. This was in connection with valuing businesses being acquired or sold by clients, or on matters involving estate taxes in valuation of the business and estate plan, and after death valuations. He has also participated in matters involving disputes between parties on business-type valuations. He performed a valuation of Sorboturf Enterprises (McQuillan's business) as of the date of termination which was August 1, 1983. He explained that he considered sales for the period of existence of the business and made a forecast of sales for a future period. As he explained, in the case of a

business that has a short history but has a growing trend in terms of its sales volume, it is usually necessary to utilize a forecast method to determine what the longer-term earnings would be in that, in evaluation, the buyer is essentially buying an income, buying a share of earnings. It is thus necessary to forecast the possible earnings in the future. He also considered expenses and costs, both past and the future. He determined a value for the athletic and equestrian distributorships. He then reached a total value for the business and reduced it to a present value. In valuing the business as of August 1, 1983, he did not consider information available after that date. He correctly stated that the valuation has to be based upon data that is available at the time of termination. S.I. and Spectrum argue that his method of valuation was inconsistent with the manner in which "loss of business value" must be proven and was without foundation and therefore speculative. The testimony of West had been admitted subject to a Motion to Strike. The Court denied the Motion to Strike.

Mr. West's testimony was not inconsistent with the formula set forth by the Ninth Circuit in *Simpson, supra*. Most of the objections of S.I. and Spectrum go to the weight of the testimony. The Court did not abuse its discretion or commit manifest error in admitting the testimony of Mr. West and denying the Motion to Strike.

MOTION IN LIMINE

The trial court granted a Motion in Limine by McQuillan and as a result S.I. and Spectrum were not permitted to introduce evidence of events occurring after

August 1, 1983, as they related to the antitrust, RICO, and damage claims.

This ruling is appealed only by S.I., who maintains that post-termination evidence was relevant to show a lack of monopoly power, bears directly on the issue of specific intent to monopolize, and can also demonstrate the absence of injury in fact.

Evidentiary rulings are reviewed for abuse of discretion. The authorities cited by S.I. do not stand for the proposition that post-termination activity must always be admitted. The relevant time-period for demonstrated monopoly power is the period in which S.I. and Spectrum were engaging in the acts complained of by McQuillan, i.e. from the time she went into business until she was forced to close. The same is true of evidence of a declining marketshare in the relevant market and inability to exclude competitors. Evidence of the existence or non-existence of these elements after the termination date may be admissible depending on the circumstances of each case. It is important to note that the kind of damages which the plaintiff is claiming may effect whether or not such post-termination evidence is admitted. S.I. cites *Greyhound Computer Corporation v. IBM Corp.*, 559 F.2d 488, 496, n. 18 (9th Cir. 1977) in support of admissibility of post-termination activity. In that case the plaintiff was suing for loss of business and future profits. Future profits would be affected by post-termination activity. McQuillan sued for the "loss of business value." The only material evidence relates to the value of her business at the time that she was terminated by the defendants.

S.I. also contends that the Court's ruling denied them the opportunity to prove that there was no "threat of continuing activity" as required by RICO. S.I. cites *Sedima v. Imrex, Inc.*, 473 U.S. 479, 105 S.Ct. 3275 (1985) as authority. In *Sedima* the Court said that there must be at least two acts and some evidence of a threat of continuing activity in order to find a pattern of racketeering activity. This language does not mean that post-termination activity is necessarily admissible in every case.

The trial court did not abuse its discretion in granting the Motion in Limine.

SHERMAN ACT – SECTION 2

(THE ATTEMPT TO MONOPOLIZE CLAIM)

The jury found against S.I. and Spectrum on the violation of Section 2 of the Sherman Act – monopolizing, attempting to monopolize, and conspiring to monopolize. The verdict form did not break down each of the claims, therefore, if the evidence is adequate to sustain any of the three theories, the verdict must be sustained. The Court instructed the jury that the plaintiff claimed that the defendants violated the Federal antitrust laws by monopolizing or attempting to monopolize the athletic shoe market insert, the polymer athletic shoe insert submarket, or the Sorbothane athletic shoe insert market. The jury was instructed that in order to prove the claim of attempted monopoly, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. That the defendants had a specific intent to achieve monopoly power in the relevant market;

2. That the defendants engaged in exclusionary or restricted conduct in furtherance of its specific intent;

3. That there was a dangerous probability that defendants could sooner or later achieve its goal of monopoly in the relevant market;

4. That the defendants' conduct occurred in or affected interstate commerce; and,

5. That the plaintiff was injured in the business or property by the defendants exclusionary or restrictive conduct.

Spectrum claims that the District Court erred in not directing a verdict or entering JNOV on the Sherman Section 2 claims because the evidence was legally insufficient to sustain the verdict. On the "attempt to monopolize" claim specifically, Spectrum argues that the record contains no evidence that Spectrum intended to destroy competition or that they committed any anti-competitive conduct directed towards that purpose.

Spectrum also contends that the Court erred in not directing a verdict or granting JNOV on the monopolization claims because there was no evidence that they had monopoly power, committed any predatory acts, or that any antitrust injury resulted from their conduct.

The Ninth Circuit, in a series of cases beginning with *Lessig v. Tidewater Oil Company*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), has held that sufficiently unfair or predatory conduct alone may satisfy both the specific intent and the dangerous probability elements of the offense, without any proof of the relevant market or the defendant's marketpower. 327 F.2d at 474-75. Some of

the opinions, including *Lessig*, dispensed with dangerous probability of success as an element of the offense since it may be inferred from proof of specific intent, which in turn may be inferred from conduct. In *Lessig*, Tidewater entered into a service station lease and dealer contract with Lessig and cancelled it later. The theory of Lessig's case was that Tidewater violated the antitrust laws by fixing the prices at which its dealers resold gasoline and by imposing upon its dealers a system of exclusive dealing and tieing arrangements in the purchase of petroleum products, tires, batteries, and automotive accessories which were sold or sponsored by Tidewater. The trial court withdrew from the jury the charge that Tidewater attempted to monopolize in violation of Section 2 of the Sherman Act. In reversing the trial court the court said:

> "The essence of monopoly is power to control prices and exclude competition and what we have said demonstrates that there was evidence that Tidewater possessed the specific intent to acquire and exercise such power with respect to a part of commerce.
>
> Tidewater argues that attempt to monopolize is established only if there is proof of 'dangerous probability of success, i.e., that if unchecked, monopolization will result'; that this requires an evaluation of Tidewater's power in the relevant market; that the evidence on this issue was inadequate, and such evidence as there was indicated a lack of any possibility that Tidewater could monopolize the sale of petroleum products or tires, batteries, and automotive accessories. (TBA)
>
> We reject the premise that probability of actual monopolization is an essential element of

> proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires – perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective.
>
> When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not an issue.' (Citations omitted) Section 2 prohibits attempts to monopolize 'any part' of commerce, and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products. If the jury found that Tidewater intended to fix the price at which 2,700 independent service station operators resold gasoline and to exclude other suppliers of petroleum products and sponsored TBA items from competing for the patronage of those operators, and took steps to accomplish that purpose, it could properly conclude that Tidewater attempted to monopolize a part of interstate commerce in violation of Section 2 of the Sherman Act." *Id.*

Later cases in the Ninth Circuit have followed *Lessig* and refined its language. In *California Computer Products, Inc. v. International Business Machines, Corp.*, 613 F.2d 727, 737 (9th Cir. 1979), the court said that evidence of market-power is not an "independent" element of an attempt claim, citing *Hallmark Industry v. Reynolds Metals Co.*, 499 F.2d 8, 12, n.3 (9th Cir. 1973). In *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 669-70 (9th Cir. 1980) the court recognized that while evidence of marketpower is not vital, it may be relevant to suggest the existence of

specific intent. It stated: "The real issue in this type of case is one of specific intent to monopolize, and we find nothing in *Lessig* which excludes consideration of market-power as one of the circumstances to be considered in determining whether such intent exists."

We are satisfied that if evidence of unfair or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower. If there is not sufficient evidence of unfair or predatory conduct, then the plaintiff will be required to show proof of relevant market or the defendant's marketpower. In *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979), an action claiming attempt to monopolize was brought against a retirement community newspaper that refused to accept carpet advertisements from dealers outside the retirement community. Over the plaintiff's insistence that proof of relevant market was unnecessary in their attempt claim, the Ninth Circuit held that "in the absence of proof of relevant market and marketpower, the plaintiff must prove either predatory conduct or a per se violation of Section 1 to prove an attempt to monopolize. . . . ". 585 F.2d at 390.

The District Court instructed the jury that "if the plaintiff has shown that the defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the defendant's marketing power." There was no objection to this instruction.

The record shows that Spectrum, acting through Jr., engaged in the following conduct:

When McQuillan became interested in Sorbothane she spent a day at H-K. At this time Jr. was Vice President of Marketing for H-K. Jr. informed her that they, H-K, had not previously considered equestrian uses for Sorbothane. At this time McQuillan presented her ideas to Jr. and other H-K personnel concerning the making of horseshoe pads or equestrian products from Sorbothane. She was also introduced to Sr. on that trip.

Jr. left H-K and decided to become a distributor for Sorbothane. Up to this time he had been with H-K and was aware of McQuillan's efforts to develop an equestrian product. Jr., as Vice President of Marketing at H-K, had been involved in establishing the regional distributor concept and the selection of the individual distributors. There is evidence that Jr. was an enthusiastic enforcer of H-K's price fixing agreements. He boasted to Heinsohn that he had his own method of policing his retailers – he would slow down their shipments if they sold below a suggested retail list price. Jr. confided to Heinsohn that he wanted to be the national Sorbothane distributor from the beginning. He and Sr. were concerned that they would be criticized for violating BTR's anti-nepotism policy if Jr. were immediately given a national distributorship.

In January 1982 there was a meeting in Jr.'s office involving Sr., Jr., Heinsohn and John Burne. Burne, through his company IEM, marketed Sorbothane in England. He was interested in becoming the national Sorbothane medical distributor in the United States over the

objections of Heinsohn, who felt the distributors had been promised the medical market. IEM was appointed national medical distributor of Sorbothane products. In order to have effective control of resale prices, it would be important to have only one person to deal with on athletic products. The result of a January 1982 meeting was an agreement that Jr. would be H-K's new national athletic distributor. In the meantime they had the problem of getting rid of the regional distributors. Jr. attempted to buy McQuillan's business and told her that if she did not agree to sell to him, she would be "looking for work." This was shortly after McQuillan was told that she would have to sell her athletic distributorship to Jr. in order to keep the equestrian distributorship rights. Sorbo, Inc. at Jr.'s direction, placed a hold on one of McQuillan's shipments of products. After her termination, Sr. gave Jr. McQuillan's customer list without consulting with her.

There is sufficient evidence from which the jury could conclude that the S.I. Group and Spectrum Group engaged in unfair or predatory conduct and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing power.

The District Court should grant a Motion for Directed Verdict only if, considering all the evidence and all reasonable inferences that can be drawn from the evidence in a light most favorable to the non-moving party, reasonable men could not arrive at a verdict in favor of the non-mover. Applying this standard, the trial court was correct in refusing to direct a verdict in defendants favor. There

is sufficient evidence in the record to sustain the attempt to monopolize claim.

PROOF OF ANTITRUST INJURY TO ESTABLISH SECTION 2 CLAIM

S.I. and Spectrum complain that the jury instructions did not require McQuillan to prove an antitrust injury to establish the Section 2 claim. They also argue that the Court should have granted their Motion for JNOV because the plaintiff offered no evidence to prove that their conduct negatively affected competition. Horizontal market division agreements (Section 1 claim) and attempts to monopolize (Section 2 claim) are treated as per se violations of the Sherman Act. Injury to competition is presumed to follow from the conduct proscribed by these Sections. *United States v. Topco, supra; Walker v. U-Haul Co. of Mississippi,* 747 F.2d 1011 (5th Cir. 1984). The jury was properly instructed on the antitrust violations and there was sufficient evidence in the record to show that McQuillan was injured as a result of the defendants' conduct.

THE ALTER EGO INSTRUCTION

The jury found that H-K was the agent or alter ego of BTR, Inc. S.I. argues that the Court improperly instructed the jury regarding alter ego because it failed to properly explain that the absence of the corporate form causing the inequitable result must:

1. amount to bad faith;

2. be the product of the acts or omissions of the entity against whom liability is sought – here BTR; and,

3. proximately harm or prove to be unjust to McQuillan. *Orloff v. Allman*, 819 F.2d 904 (9th Cir. 1987). S.I. also argues that the party against whom the alter ego doctrine is invoked must have been an actor in the course of conduct constituting the "abuse of the corporate privilege".

The jury instructions given by the Court were consistent with the cases cited by S.I. in support of its arguments.

The jury was instructed that a corporation is a separate legal entity. The jury was further instructed that the corporate form can be disregarded where:

> [T]here is such a unity of interest and ownership that the separate personalities of the parent corporation and the subsidiary no longer exist; and . . . an inequitable result would follow if the acts are treated as those of the subsidiary corporation alone.

The jury was specifically told to consider:

> One, whether the parent corporation is the principal stockholder of the subsidiary corporation; two, whether the parent corporation uses the subsidiary corporation as its marketing or distributing arm; three, whether the officers and directors of the two corporations are the same; four, whether the parent corporation holds the other corporation out to the public as a mere division or agent; five, whether the parent corporation has sufficient involvement with the day-to-day operation of the subsidiary corporation; six, whether the corporations have conducted separate board meetings and maintained

> separate minutes of board meetings; and whether an inequitable result will occur if the conduct is not attributable to both defendants.

Finally, the jury was cautioned:

> However, it is not sufficient in this regard for the plaintiff to show merely that the defendant BTR, Inc., owns all the stock in the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing Company, or that the officers or directors of Sorbothane, Inc., and Hamilton Kent Manufacturing Company are the same as those of the defendant BTR. Factors which may be relevant in showing the domination or control include proof that there was a commingling of assets, that there was representations to the plaintiff that BTR, Inc. was liable for the debts of the defendants Sorbothane, Inc., and Hamilton Kent Manufacturing Company; that the defendant Sorbothane Inc., and Hamilton Kent Manufacturing Company used the same employees and facilities as the defendant BTR, Inc.; and that the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing Company were mere shells or conduits for business which was fed directly to BTR, Inc.
>
> Each of these factors must be balanced and weighed by you to see if, in the totality of the evidence, the preponderance proves any lack of independent existence or control by the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing.

These jury instructions were consistent with *Orloff, supra,* which states:

> The California alter ego doctrine . . . applies where:

> (1) such a unity of interest and ownership exists that the personalities of the corporation and individual are no longer separate, and
>
> (2) an inequitable result will follow if the acts [giving rise to liability] are treated as those of the corporation alone.

819 F.2d at 908-09, citing *RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 545 (9th Cir. 1985) and *Automotriz Del Golfo De California, S.A. De C.V. v. Resnick*, 47 Cal.2d 792, 797, 306 P.2d 1, 4 (1957); *see also, Firstmark Capital Corp. v. Hempel Financial Corp.*, 859 F.2d 92, 94 (9th Cir. 1988).

S.I. argues that BTR must have been guilty of "wrongdoing" for the alter ego doctrine to apply. In *Firstmark*, this Court stated

> "A California Court of Appeal stated the [alter ego liability] rule thus, 'The fraud or inequity sought to be eliminated must be that of the party against whom the alter ego doctrine is invoked, and "such party must have been an actor in the course of conduct constituting the 'abuse of the corporate privilege'. . . . " ' *American Home Insurance Co. v. Travelers Indemnity Co.*, 122 Cal.App.3d 951, [966], 175 Cal.Rptr. 826, 834 (1981) (citations omitted)."

Firstmark Capital Corp. v. Hempel Financial Corp., supra, 859 F.2d at 94.

The jury instructions here were consistent with *Firstmark*. BTR, through Cahill, was an actor in the course of conduct constituting the abuse of the corporate privilege. *Firstmark* does not suggest that BTR had to have an evil motive or be independently liable for the wrongdoing.

Indeed, alter ego liability is unnecessary if a party is independently liable.

S.I. contends that BTR merely engaged in the "normal supervisory actions" of a parent corporation. The jury, properly instructed on the relevant factors, resolved this factual issue against BTR and there was substantial evidence to support their conclusion.

ATTORNEYS FEES

The parties agree that the standard of review is abuse of discretion or clear error of law. What constitutes an appropriate award of attorneys fees and any enhancement thereof for payment delay or risk of non-payment are matters within the trial court's discretion.

The trial court denied McQuillan's request for fee enhancement based on delay and risk of non-payment and also rejected a portion of the alleged lodestar. McQuillan appeals only from the denial of enhancement. McQuillan sought enhancements totalling $574,042.00 for the delay in payment and for the risk of non-payment.

McQuillan argues that *Missouri v. Jenkins by Agyai*, ___ U.S. ___, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) holds that reasonable attorneys fees, in cases involving contingent fee agreements, *must* include compensation for delay in payment and may include enhancement for the risk of non-payment. This is an incorrect statement of the holding in that case and counsel conceded as much in oral argument. The Court held that an enhancement for delay in payment is "an appropriate factor in the determination

of what constitutes a reasonable attorney's fee. . . . " 109 S.Ct. at 2469. It did not hold that it was mandatory.

The District Court pointed out that the Court in *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) noted the "strong presumption" that the lodestar amount represents a reasonable fee, and that enhancements are to be given only in "rare" or "exceptional" circumstances. As pointed out by S.I. and Spectrum, the trial court gave a "de facto" enhancement by utilizing the "average" hourly rate advanced by McQuillan in support of the fee application. This "average" was in fact a weighted mean calculated by dividing the total billed by the total hours. This adopted a higher billing rate set at current rates which is one of the common methods of enhancement for delay. *Jenkins*, 109 S.Ct. at 2469.

The Court explained its reasoning in denying enhancement and its decision is affirmed. There was no abuse of discretion.

THE DAMAGE AWARD

The jury returned the same damage award, $1,743,000.00, against all defendants on each Count on which they were found liable. Spectrum and Jr. argue that they were not found liable on some of the claims and certain claims were not even asserted against them, therefore, the Court erred in not granting a new trial due to the inconsistent damage awards. S.I. puts forth the same argument adding that there was obvious jury confusion and misunderstanding, thereby requiring a new trial.

The Seventh Amendment right to a jury trial requires validation of verdicts if at all possible. *Pierce v. Southern Pacific Transportation Company*, 823 F.2d 1366, 1370 (9th Cir. 1987). The Court has the duty to reconcile the jury's special verdict responses on any reasonable theory consistent with the evidence. *Pierce, supra*, at 1370, *Ortiz v. Bank of America National Trust and Savings*, 852 F.2d 383 (9th Cir. 1988), *In Re Hawaii Federal Asbestos Cases*, 871 F.2d 891, 894 (9th Cir. 1989), citing *Gallick v. Baltimore & O. R.R.*, 83 S.Ct. 659, 666-67, 372 U.S. 108, 119-22 (1963). The verdict against S.I. Group on the Sherman Act Section 1 claim is supported by the evidence as has been set forth herein before. The verdict against S.I. Group and Spectrum Group on the attempt to monopolize claim is also supported by the evidence. The Court need not address the arguments that the damages awarded on the other verdicts are not supported by the evidence.

OTHER ISSUES RAISED BY S.I. GROUP AND SPECTRUM GROUP

S.I. Group and Spectrum Group raise many other issues relating to the pendant state claims and the RICO claims. In view of the foregoing, it is not necessary for the Court to address any of those issues.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIRLEY McQUILLEN, et al.,	)	No. 89-55326
	)	89-55329
Plaintiffs/Appellees/ Cross-Appellants,	)	89-55332
	)	(Consolidated)
vs.	)	
	)	ORDER
SORBOTHANE, INC., et al.,	)	
	)	
Defendants/Appellants/ Cross-Appellees.	)	(Filed April 1, 1991)
	)	

BEFORE: TANG and O'SCANNLAIN, Circuit Judges, and MARQUEZ, District Judge*

The panel has voted to amend its July 3, 1990 Memorandum Decision as follows:

At page 22, the final sentence of the first full paragraph reading: "There was no objection to this instruction." shall be deleted.

With the Memorandum Decision so amended, the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

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* Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, dba SORBOTURF ENTERPRISES, Plaintiffs, v. SORBOTHANE, INC., aka SORBO, INC.; HAMILTON-KENT MFG. COMPANY, INC.; BTR, INC.; SPECTRUM SPORTS, INC.; KENNETH M. LEIGHTON; and KENNETH B. LEIGHTON, JR.; Defendants.	Civil No. 84-1585-E(CM) MEMORANDUM DECISION (Filed Dec. 19, 1988)

BACKGROUND

This is a case against multiple defendants brought by plaintiffs Shirley McQuillan and her husband, Larry, alleging that their exclusive distributorship for the product Sorbothane was wrongfully terminated. Sorbothane is a patented polymer material valued for its shock absorbent tendencies. Most notable among its uses is its cushioning effect in athletic shoes.

Plaintiffs' complaint alleged violations of state and federal antitrust and racketeering laws, as well as asserting common law contract and tort claims. After an eight-week trial ending on July 11, 1988, the jury found all defendants liable on each and every claim of relief, with the exception of defendants Spectrum Sports and Kenneth B. Leighton, who were found liable on all but three claims of relief. A jury award of $1,743,000 was rendered

on all claims. A punitive damage jury award of $500,000 was later waived by the plaintiffs.

Defendants now move for a judgment notwithstanding the verdict or, in the alternative, for a new trial. Plaintiffs move the court to award attorney's fees, prejudgment interest, and to retax costs.

I.

JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) OR FOR NEW TRIAL

Defendants move for a JNOV or, in the alternative, a new trial. Essentially, defendants question the sufficiency of proof on all of the plaintiff's claims, as well as question the amount and form of the damage verdict and certain evidentiary rulings made by this court.

A motion for a JNOV focuses on the sufficiency of the evidence. The standard for granting a JNOV is the same legal test as for a directed verdict. *Fountila v. Carter*, 571 F.2d 487, 489-90 (9th Cir. 1978). In making a determination on a JNOV, the court considers "all evidence in the light most favorable to the non-moving party and draw[s] all reasonable inferences in favor of that party." *Twin City Fire Ins. v. Philadelphia Life Ins. Co.*, 795 F.2d 1417, 1423 (9th Cir. 1986). A JNOV "is not proper if there is substantial evidence to support a verdict for the non-moving party." *Id.* Further, such motions should be cautiously and sparingly granted as there must be a minimum of interference with the jury. *Walker v. KFC Corp.*, 515 F. Supp. 612, 616 (S.D. Ca. 1981), *aff'd in part and rev'd in part*, 728 F.2d 1215 (9th Cir. 1984), *citing* 9 Wright & Miller, *Federal Practice and Procedure*, § 2524 (1971).

"A party may secure a JNOV only 'in accordance with its motion for a directed verdict.' " *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429 (9th Cir. 1986), *quoting* Fed. R. Civ. P. 50(b). A directed verdict motion can therefore serve as a prerequisite to a JNOV "only if it includes the specific grounds asserted in the JNOV motion." *Id.* at 1429. *See also* 9 Wright & Miller, *Federal Practice and Procedure*, § 2537 (1971).

In contrast, a motion for new trial does not test the legal sufficiency of the evidence adduced at trial by the prevailing party. *Walker*, 515 F. Supp. at 619. Instead, it may be granted by the court "if in its opinion, the jury's verdict was clearly contrary to the weight of the evidence." *William Inglis, Etc. v. ITT Continental Baking Co.*, 688 F.2d 1014, 1027 (9th Cir. 1982), *cert. denied*, 459 U.S. 825 (1982).

The instant case involved a lengthy and complex trial. Both sides submitted extensive testimony and documentary evidence in support of their positions. This court has fully considered the papers submitted on the issues, as well as the argument of counsel; however, it declines to substitute its judgment for that of the jury. The parties received a fair and impartial trial, and the record in this case reasonably supports the jury's verdict. Accordingly, the court denies defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial.

II.

ATTORNEY'S FEES

Section 4 of the Clayton Act, 15 U.S.C. § 15 allows a successful treble damage plaintiff to recover reasonable

attorneys' fees as costs of suit. The purpose of the attorneys' fees provision is to insulate treble damage recovery from large expenditures for legal fees. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312 (9th Cir. 1982), *cert. denied*, 459 U.S. 1009 (1982). *Accord Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 663 (7th Cir. 1985). "An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory." *Twin City Sportservice*, 676 F.2d at 1312.

Similarly, the Racketeer Influenced and Corrupt Organizations Act (RICO) permits the successful plaintiff in a civil RICO action to recover reasonable attorneys' fees as a part of the costs of suit. 18 U.S.C. § 1964(c). The same applies under section 16750(a) of the California Business and Professions Code, the California Cartwright Act.

" 'The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.' " *Pennsylvania v. Delaware Valley Citizens' Council (Delaware I)*, 106 S. Ct. 3088, 3097 (1986), *quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This establishes a lodestar figure. Additionally, a district court may adjust the fee upward or downward based upon the factors identified in *Kerr v. Screen Actors Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976) (adopting twelve factors set forth in *Johnson v. Georgia Statistics Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).[1]

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[1] Those factors include: 1) the time and labor required, 2) the novelty and difficulty of the questions involved, 3) the skill

(Continued on following page)

However in *Delaware I*, the Supreme Court held that many of the *Kerr* factors " 'are subsumed within the initial calculation of the lodestar amount.' " 106 S. Ct. at 3098, *citing Blum v. Stenson*, 465 U.S. 886, 898-900 (1984). The Court did not preclude upward adjustments of the lodestar, although it noted that such modifications are proper only in " 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." *Id., citing Blum*, 465 U.S. at 898-901. Therefore, there is a strong presumption that the lodestar amount represents a reasonable fee. *Id.* at 3098.

Plaintiffs prevailed on each of their claims for relief predicated on RICO and the federal and state antitrust laws against each of the defendants. Accordingly, they now seek attorneys' fees of $1,759,969. This includes a lodestar amount of $1,185,927 reflecting 9,008.4 hours as of September 19, 1988 at an average billing rate of $130.94.[2]. Additionally, plaintiffs seek an enhancement

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(Continued from previous page)

requisite to perform the legal service properly, 4) the preclusion of ~~other~~ employment by the attorney due to acceptance of the case, 5) the customary fee, 6) whether the fee is fixed or contingent, 7) time limitations imposed by the client or the circumstances, 8) the amount involved and the results obtained, 9) the experience, reputation, and ability of the attorneys, 10) the "undesirability" of the case, 11) the nature and length of the professional relationship with the client, and 12) awards in similar cases.

[2] This court adopts the plaintiffs' average billing rate of $130.94 as a reasonable hourly rate. *See* Verified Application for an Award of Attorneys' Fees, Declaration of James F. Stiven, page 8, ¶11.

for delay in payment of $137,358, and an enhancement of thirty-three percent, $436,684 for the risk of nonpayment.

In examining the lodestar, this court may consider only the time spent in prosecuting those claims supporting the imposition of attorneys' fees. *See, e.g., Twin City Sportservice,* 676 F.2d at 1316. Thus, time devoted to work that is duplicative or connected to claims or activities unrelated to the successful recovery of those claims supporting attorneys' fees may be excluded. *Id. Accord, In re Equity Funding Corp. of America Securities,* 438 F. Supp. 1303, 1328 (C.D. Cal. 1977).

Further, it is plaintiff's burden to establish the amount of compensable attorney time. *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc,* 776 F.2d 646, 650 (7th Cir. 1985). Vague or insufficient documentation of hours is not compensable. *Exhibitors' Service, Inc. v. American Multi-Cinema,* 583 F. Supp. 1186, 1193 (C.D. Cal. 1984); *In re Equity Funding,* 438 F. Supp. at 1327.

Defendants have raised numerous objections to plaintiffs' lodestar amount. They include objections to the pendent state claims, duplicate time, and inconsistent or insufficient documentation. The BTR defendants in a Supplemental Memoranda filed October 18, 1988 have detailed amounts that they consider to be appropriate deductions as to these categories. This court has fully considered those objections which it considers to be reasonable and grounded in case law and, consequently, applies a deduction of $273,894.50 to plaintiffs' requested

lodestar amount.[3] This provides for a lodestar amount of $912,032.50 reflecting 6,965.3 hours at the average hourly billing rate of $130.94.

Lastly, as noted above, plaintiffs seek enhancements totaling $574,042 for the delay in payment and for the risk of nonpayment. *See Pennsylvania v. Delaware Valley Citizens' Council (Delaware II)*, 107 S. Ct. 3078 (1987) (dealing with issue of enhancement for risk of nonpayment). This court determines that an enhancement of the lodestar is inappropriate. It has considered the narrow standards as set out in *Delaware II* to justify enhancement based upon the risk of nonpayment, but finds that the plaintiffs have not met their burden in meeting those standards.

Further, this conclusion acknowledges the *Delaware I* decision noting the "strong presumption" that the lodestar amount represents a reasonable fee, and that enhancements are to be given only in "rare" or "exceptional" circumstances. 106 S. Ct. at 3098. Limiting attorneys' fees in this manner is neither unfair nor unjust to the plaintiffs or plaintiffs' attorneys, instead it is consistent with the rationale behind fee-shifting statutes, including those in the instant case. *Delaware I*, 106 S. Ct.

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[3] This total includes deductions of $164,362.50 for pendent state claims, $11,812 for duplicative time, and $97,720.00 reflecting inconsistent or insufficient entries. Supplemental Memorandum of Defendants Sorbothane, Inc., Hamilton-Kent Manufacturing Company, Inc., BTR, Inc., and Kenneth M. Leighton Re: Plaintiffs' Application for Attorneys' Fees, p. 8, n.5.

at 3098-99. Accordingly, this court finds that plaintiffs are entitled to a reasonable fee award of $912,032.50.

III.

PREJUDGMENT INTEREST

A district court may award prejudgment interest on compensatory damages in order to make an injured party whole. *American Timber & Trading v. First Nat. Bank of OR.*, 690 F.2d 781, 784 (9th Cir. 1982), *citing United States v. Cal. State Bd. of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981). An award of prejudgment interest in a case is left to the sound discretion of the trial court. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982). It is this court's view that plaintiffs have received full and complete recovery for their alleged injury and, therefore, declines to award prejudgment interest.

IV.

RETAX COSTS

This court may review the clerk's assessment of costs *de novo* and "to decide the cost question himself" by exercising its own discretion. *Farmer v. Arabian-American Oil Co.*, 379 U.S. 227 (1964); *Chavez v. Tempe U. Hight Sch. Dist. No. 213*, 565 F.2d 1087 (9th Cir. 1977). Plaintiffs seek to recover the costs of their computer-assisted legal research and costs of copying incident to discovery. The clerk of the court allowed those items properly chargeable as costs. Plaintiffs' motion to retax costs is denied.

V.

CONCLUSION

Upon due consideration of the parties' memoranda and exhibits, the arguments advanced at hearing, and for the reasons set forth herein, the court hereby denies defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. Additionally, the court grants plaintiffs' motion for attorneys' fees in the amount of $912,032.50. Plaintiffs' motions for pre-judgment interest and to retax costs are denied.

DATED: December 19, 1988.

/s/ William B. Enright
WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to:

Plaintiffs

Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, dba SORBOTURF ENTERPRISES, Plaintiffs,	)	Civil No. 84-1585-E(CM)
v.	)	ORDER
SORBOTHANE, INC., aka SORBO, INC.; HAMILTON-KENT MFG. COMPANY, INC.; BTR, INC.; SPECTRUM SPORTS, INC.; KENNETH M. LEIGHTON; and KENNETH B. LEIGHTON, JR.; Defendants.	)	

Pursuant to this court's Memorandum Decision dated December 19, 1988, defendants' motion for a judgment notwithstanding the verdict or, in the alternative, a new trial, is denied. Additionally, the court grants plaintiffs' motion for attorneys' fees in the amount of $912,032.50. Plaintiffs' motions for prejudgment interest and to retax costs are denied.

DATED: December 19, 1988.

/s/ William B. Enright
WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to:
Plaintiffs
Defendants